Supreme Court, U.S.
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No. 97-1868

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,
v.
JOHN E. WARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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UNUM Life Insurance Company of America files the following Supplemental Brief to bring to the Court's attention what it believes are significant errors contained in Respondent Ward's Supplemental Brief as to the holding of this Court's recent decision in *Humana Inc. v. Forsyth,* 119 S.Ct. 710 (1999) and its impact on the present case.

Forsyth addressed whether RICO—as applied to an alleged scheme by an insurer to make misrepresentations about the amount of premiums it was charging its customers—would be preempted by the McCarran-Ferguson Act (15 U.S.C. § 1012(b)) as "impairing" Nevada laws regulating the business of insurance. Ward argues that the Nevada laws regulating this practice did not spread risk, were not limited to entities in the insurance industry, and in fact included common law rules of general application. Ward also noted—correctly—that RICO's appli-

cation to the Nevada law would only be at risk if the law regulated "the business of insurance" as defined by McCarran-Ferguson. However, Ward then argues that because this Court decided whether RICO "impaired" these laws it must have adopted a much broader test for the "business of insurance" than was laid down in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) and *Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205 (1979) which cases defined the McCarran-Ferguson exemption narrowly and specifically held that the spreading of risk was an "essential" element to the business of insurance.

UNUM submits that this Court could not have been making significant pronouncements about the scope of the business of insurance in the *Forsyth* case, as this issue was not even before the Court. The issue was not briefed by any parties to the lawsuit. In fact, at footnote 13, Respondent Forsyth expressly stated that this is not an issue. (Respondent was the party in whose interest it would have been to argue that McCarran-Ferguson could not preempt the application of RICO to her lawsuit because the state laws in question did not regulate the business of insurance.) Instead, the focus of the briefs of each of the parties, as well as the Opinion of this Court, is entirely on whether application of RICO would "invalidate, impair, or supersede" a Nevada regulatory scheme that was assumed to be a state law regulating the business of insurance. As such, Ward would have this Court accept that an opinion which never addresses the scope ot the business of insurance overruled—by implication—the holdings of *Pireno* and *Royal Drug* on that subject.

Ward also argues that by saying that RICO was not inconsistent with state common law remedies like "bad faith" the opinion also overruled the express holding of *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) that such laws did not constitute regulation of "the business of insurance." That this sea change in the scope of "the business of insurance" would occur by implication in a case in which that issue was not only not briefed to the

court, but was expressly agreed to be not an issue, is an argument that falls of its own weight.

More significantly, Ward is wrong in his initial assumption, that the state law which the insurer in *Forsyth* argued would be impaired by the application of RICO was not within the accepted definition of the business of insurance. The insurer was accused of a scheme in which it informed its customers that they were paying 20% of medical costs, but that because of alleged discounts the customers were actually paying a substantially larger percentage of the actual cost. In other words, the insurer was accused of informing its customers that it would accept and spread 80% of the risk, while it was really accepting and spreading a smaller percentage. As such, a state law that regulated this practice so obviously spread risk that it is not surprising that application of McCarran-Ferguson was assumed by the parties and this Court.

Respectfully submitted,

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